PUBLIC PROSECUTOR

v.

TIONG CHING HENG

HIGH COURT MALAYA, MUAR
RICHARD TALLALA JC
[CRIMINAL APPEAL NO. 52-5 OF 1987]
1 APRIL 1990

CRIMINAL PROCEDURE: *Section 3 of Prevention of Corruption Act 1961 - Section 26(1) Corruption Act - Consent of the prosecutor - Accused acquitted and discharged without defence being called - Nullity of trial - Section 114(e) of the Evidence Act 1950 - Official acts.*

The respondent was charged with corruption under s. 3 of the Prevention of Corruption Act 1961 (the Act), At the end of the case for the prosecution, the Judge acquitted the respondent without calling on him for his defence. This was based on the question of validity of consent of the Deputy Public Prosecutor under s. 26(1) of the Act. The appellant appeals from that discharge and acquittal.

Held:

[1] If a Deputy Prosecutor himself prosecutes a case, there is no need for a formal consent.

[2] All that was required was the consent of the prosecutor, the prosecutor was not required in law to come forward and explain how he gave such consent. There is no evidence that the Deputy Public Prosecutor did not examine the relevant facts with care before giving his consent.

[Matter be remitted to Sessions Court for proceeding to trial.]

Cases referred to:
Abdul Hamid v. PP [1956] 22 MLJ 231
PP v. Mohamed Halipah [1982] 1 MLJ 155
PP v. Oie Hee Koi & Associated Appeals [1968] 1 MLJ 148

Legislation referred to:
Evidence Act 1950, s. 114illus.(e)
Dangerous Drugs Ordinance 1952, s. 39B(3)
Internal Security Act 1960, s. 57(1)
Prevention of Corruption Act 1961, ss. 3(a)(ii), 26(1), 80

Other source referred to:
Stroud 3rd Edn., Vol. 1, p. 582

For the appellant - Tan Poh Lai, DPP
For the respondent - in person

JUDGMENT

Richard Tallala JC:

The respondent was charged before the learned Sessions Court Judge as follows:

> That you on 7 July 1983 between 3p.m. to 4p.m. at a shop namely Tong Huat Motor Co., No. 69, Jalan Besar, Parit Sulong, in the District of Batu Pahat, in the State of Johor, did corruptly receive for yourself a gratification, to wit, RM70 cash, from one Sumadi bin Hj. Ahmad, as an inducement to a member of a public body, to wit, Constable 97713 Zainuddin bin Hashim, Balai Polis Parit Sulong for forbearing to a thing in respect of a matter in which the public

body is concerned, to wit, not taking legal action against one Mohd. Rahman bin Sumadi, who had allegedly committed traffic offences for riding an unregistered motorcycle without a driving licence on 6 July 1983 at about 4.30 p.m. at the Main Road, Parit Sulong and that you thereby committed an offence under s. 3(a)(ii) and punishable under s. 3 of the Prevention of Corruption Act 1961 (Laws of Malaysia Act 57).

The respondent claimed trial to the charge. A trial followed. At the end of the case for the prosecution the learned Judge acquitted the respondent without calling on him for his defence.

Section 26(1) of the Prevention of Corruption Act 1961 provides that a prosecution under that act shall not be instituted except by or with the consent of the prosecutor.

In this case there was such a consent. There was nothing wrong with it except for a mispelt name. As stated in the charge the shop at which the offence is alleged to have taken place was named Tong Huat Motor Co. In the consent the name 'Tong' was misspelt 'Tiong'.

The Deputy Public Prosecutor under whose hand the consent was given was called as a witness. He testified as follows:

The actual place of incident was at Tong Huat Motor Co., and not at Tiong Huat Motor Co. Pt. Sulong, Batu Pahat. The mistake was a typographical error.

Notwithstanding the testimony Counsel for the respondent attacked the validity of the consent. He submitted that it was insufficient for the Deputy Public Prosecutor merely to rely on the brief facts or any information given by the investigating officer. Counsel emphasized that he had to peruse from cover to cover the investigation pap er, weigh the issue in depth and then after deep thought give the necessary consent. Anything less than that would vitiate the consent.

The learned Judge accepted Counsel's submission and acquitted and discharged the respondent without calling for his defence. In so doing the learned Judge said that the trial was a nullity because the learned Deputy Public Prosecutor did not study the investigation papers but instead issued his consent based on information given to him by the investigating officer. The learned Judge referred to the evidence of the Deputy Public Prosecutor to the effect that the particulars which he obtained in the consent were obtained from information and facts given to him by the investigating officer. The learned Judge then referred to *dicta* in the judgment of Smith J in *Abdul Hamid v. Public Prosecutor* [1956] 22 MLJ 231 at p. 232 which is set out as follows:

There is an essential difference to my mind between a sanction and a consent. A prosecution can be sanctioned without any deep consideration of the particular case: full consideration is required for consent since "consent' is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. (*Stroud* 3rd Edn., Vol. 1, p. 582).

The learned Judge appeared to have been swayed by Counsel's submission. The submission was untenable in law. The Deputy Public Prosecutor's evidence was in no way challenged. He was not cross-examined at all.

Counsel did not appear to have addressed himself on the law.

If a Deputy Public Prosecutor himself prosecutes a case there is no need for a formal consent. See the case of *PP v. Mohamed Halipah* [1982] 1 MLJ 155. In that case defence Counsel raised the question of consent of the public prosecutor under s. 39B(3) of the Dangerous Drugs Ordinance. Yusof Abdul Rashid J following the Privy Council case of the *PP v. Oie Hee Koi & Associated Appeals* [1968] 1 MLJ 148, said at p. 159:

> It is to be noted that in the above case the prosecution was conducted before the High Court by a Deputy Public Prosecutor who under the Criminal Procedure Code is vested with all the powers of the public prosecutor. On the authority of this case, it is clear that where the prosecution is conducted by a Deputy Public Prosecutor the consent of the public prosecutor is implicit in his action and no written consent of the public prosecutor is required.

In the Privy Council case their Lordships were dealing with a charge under s. 57(1) of the Internal Security Act 1960 and Lord Hodson at p. 154 had this to say:

> It was further argued that under s. 80 of the Act the consent of the public prosecutor to the prosecution should have been and was not obtained. The answer to this objection is that the public prosecutor was himself the prosecutor and his consent was implicit in his action. The provision in s. 80 requiring consent is applicable where prosecution take place, e.g., before a Sessions Court and the public prosecutor is not the actual prosecutor.

To my mind a *fortiori* when the prosecutor himself testifies in the trial expressly to correct a mistake in spelling.

All that was required was the consent of the prosecutor. The prosecutor was not required in law to come forward and explain how he came to give such consent. Section 114(e) of the Evidence Act 1950 enables the Court to presume that official acts have been regularly performed. There is no evidence that the Deputy Public Prosecutor did not examine the relevant facts with care before giving his consent. He was exposed to cross-examination on this point. The opportunity was not taken to test him.

The learned Judge addressed himself on the one issue only. Inasmuch as the consent is valid the trial should proceed.

Accordingly I order that this matter be remitted to the learned Sessions Court Judge for him to proceed with the trial and consider whether or not on the evidence adduced by the prosecution to call upon the respondent for his defence.

Also found at [1990] 2 CLJ 87